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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE ARIZONA) DOCKET NO. E-01345A-01-0822
PUBLIC SERVICE COMPANY'S REQUEST)
FOR A VARIANCE OF CERTAIN) **BRIEF OF THE ARIZONA TRANSMISSION**
REQUIREMENTS OF A.A.C. R14-2-1606) **DEPENDENT UTILITY GROUP ON**
) **PROCEDURE AND ISSUES**

Pursuant to the Procedural Order in this docket dated December 11, 2001, the Arizona Transmission Dependent Utility Group ("ATDUG")¹ herewith submits its brief addressing the appropriate procedural mechanism for the Commission's consideration of this requested variance and addressing additional due process requirements needed in this proceeding.

At the outset, we believe the Commission should decide whether the application of Arizona Public Service Company ("APS") requesting a variance is an appropriate application of R14-2-1614.C. It is obvious

¹ Aguila Irrigation District, Ak-Chin Indian Community, Buckeye Water Conservation & Drainage District, Central Arizona Water Conservation District, Electrical District No. 3, Electrical District No. 4, Electrical District No. 5, Electrical District No. 7, Electrical District No. 8, Harquahala Valley Power District, Maricopa County Municipal Water District No. 1, McMullen Valley Water Conservation and Drainage District, Roosevelt Irrigation District, City of Safford, Tonopah Irrigation District, Wellton-Mohawk Irrigation and Drainage District.

1 from reading this provision that it was intended to give the
2 Commission an opportunity to tailor compliance with the Competition
3 Rules to specific situations when the public interest would be served
4 by doing so. It is also obvious that such a request might implicate
5 an approved tariff or order of the Commission if the Commission
6 decided to consider granting an exception or variance. Under the
7 first scenario, the path to a decision is clear. Under the latter
8 situation, the rule reads as if the tariff or order trumps the rule
9 provision allowing a variance or exception. Thus, any approved tariff
10 or order of the Commission that did not incorporate the variance rule
11 would, in effect, prohibit it from being utilized. In other words,
12 this application requesting a variance would be inappropriate. The
13 testimony of Jack Davis (p.9) directly raises the issue and the
14 Commission should squarely face it before proceeding further and
15 causing the parties to incur further expense.

16 The Commission should also decide whether the variance rule is
17 contemplated when, as here, there is a settlement agreement among
18 multiple parties. As we observed above, the variance rule on its face
19 appears to be intended to allow the Commission to deal with the
20 question of a variance or exception either (1) in the context of
21 application of the rules directly to a jurisdictional entity outside
22 the context of an approved tariff or Commission order or (2) in the
23 context of an approved tariff or Commission order, the latter
24 situation signaling some limitation. However, the subject of multiple
25 party involvement in such a tariff or order is not addressed. In this

1 case, a settlement agreement, albeit confirmed by a Commission order,
2 is the backdrop for APS' request. It involves multiple parties. It
3 seems an open question whether the variance rule was intended to apply
4 when parties other than the Commission and the applicant were also
5 signatories to an agreement approved by the Commission. In this
6 context, the Commission order reference in the variance provision may
7 not be applicable. In our view, the Commission needs to address this
8 issue now so that the parties have the benefit of the Commission's
9 interpretation of its order. Some of the parties to the settlement
10 agreement may wish to address the issue of whether the Commission has
11 the authority to unilaterally allow a variance that changes the terms
12 or application of the settlement in question, especially where the
13 other signatories have relied to their detriment on the settlement.

14 These are serious issues. They deserve to be addressed at the
15 outset in this proceeding, not left to future legal arguments by
16 parties who feel aggrieved by the outcome of this proceeding.

17 Substantively, we believe the issues include serious questions
18 about the impact of this proposal on the ability of the wholesale
19 market in Arizona to remain competitive, at least as it affects the
20 Phoenix load pocket. We agree with the Commission staff that transfer
21 of generation assets from APS to its affiliate, otherwise contemplated
22 by the Competition Rules, should be postponed. Once that asset
23 transfer is accomplished, the receiving entity, Pinnacle West Energy
24 Corporation ("PWEC"), will be an exempt wholesale generator and
25 forever beyond the reach of the Commission. Additionally, if APS is

1 correct that the Competition Rules aren't working and that forced
2 bidding for power resources at market rates will disadvantage its
3 standard offer customers, then the Commission must examine why that is
4 so. If the merchant plants other than PWEC's cannot serve APS
5 customers, one obviously asks why. Is it because APS is exerting
6 transmission market power? Since the Commission is requiring new
7 plants to have some resource available for serving needs in Arizona,
8 it is totally at cross purposes for those resources not to be
9 available. If APS is correct, this is a very serious situation.

10 The Federal Energy Regulatory Commission apparently agrees that
11 this type of situation is serious. On November 20, 2001, it issued
12 its "Order on Triennial Market Power Updates and Announcing New,
13 Interim Generation Market Power Screen and Mitigation Policy", AEP
14 Power Marketing, Inc., et al., Docket Nos. ER96-2495-015, et al. In
15 that order, FERC announces a new market power screen to replace the
16 "hub and spoke" analysis. The Commission should also consider this
17 FERC order in the context of its analysis of the problem here.

18 Finally, we note that APS has supplied testimony from Dr.
19 Hieronymus that propounds the thesis that the arrangement APS seeks to
20 have approved is valid because it produces a result that is better
21 than that experienced in California. The Commission needs to examine
22 whether not being as bad as California is an appropriate standard by
23 which to judge transactions involving Arizona consumers.

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1 RESPECTFULLY SUBMITTED this 19th day of December, 2001.

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3 ARIZONA TRANSMISSION DEPENDENT
UTILITY GROUP

4
5 By 

6 Robert S. Lynch
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